IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-207

DARLENE RUTH BOWMAN,
Petitioner

v.

PHYLLIS BOWMAN SIMPSON,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS SUPREME COURT

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CITATIONS

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PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS SUPREME COURT

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the Texas Supreme Court entered in the above case on May 11, 1977.

OPINIONS BELOW

The Texas Supreme Court by docket notations made in compliance with Rule 483 of the Texas Rules of Civil Procedure refused Petitioner's Application for Writ of Error thereby approving the Judgment and opinion of the Texas Court of Civil Appeals for the Ninth Supreme Judicial District of Texas, reported in 546 S.W.2d 99 (Ct. Civ. App.—Beaumont 1977, err. ref.) and appended hereto. (Appendix C at 26)

JURISDICTION

The Texas Supreme Court's refusal of Petitioner's Application for Writ of Error was made and entered on May 11, 1977, (See Notice, Appendix D at 32) and this Petition for Writ of Certiorari is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

QUESTION PRESENTED

Whether the Texas Supreme Court should have granted Petitioner's Application for Writ of Error and upon hearing thereof held that the Supremacy Clause of the United States Constitution compels community property states to recognize the validity of joint tenancy with right of survivorship agreements pertaining to shares in a Federal Credit Union issued to spouses in such manner pursuant to the provisions of the Federal Credit Union Act.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner contends that the Texas Constitution, Art. XVI, section 15, as interpreted and applied by the Texas Courts, is in conflict with the Federal Credit Union Act, 12 U.S.C. Section 1759. The pertinent parts of the respective provisions are as follows:

> TEXAS CONST. art. XVI, section 15. All property . . . owned or claimed . . . before marriage, and that acquired afterward by gift, devise or descent, shall be . . . separate property . . . provided that husband and wife . . . may . . . partition between themselves in severalty or into equal undivided interests all or any part of their existing community property . . . whereupon the portion or interest set

> aside to each spouse shall be and constitute a part of the separate property of such spouse. . . .

> 12 U.S.C.A. Sec. 1759. MEMBERSHIP. . . . Shares may be issued in joint tenancy with right of survivorship with any persons designated by the credit union member, . . .

As a result of the conflict above mentioned Petitioner contends that the following is also applicable:

> UNITED STATES CONSTITUTION, Art. VI, clause 2: This Constitution, and the laws of the United States which shall be made in pursuance thereof; . . . shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding.

STATEMENT OF THE CASE

DARLENE RUTH BOWMAN, Petitioner, and FRED E. BOWMAN, her late husband, acquired approximately $20,000 worth of Federal Credit Union shares, (Appendix A at 19), which under Texas law, constituted community property. All such shares were issued and held pursuant to a properly signed Joint Share Account Agreement providing for right of survivorship. (Appendix A at 19)

Following Mr. Bowman's death intestate, his surviving spouse, the Petitioner DARLENE RUTH BOWMAN, and his only child, an adult daughter from a prior marriage, the Respondent, PHYLLIS BOWMAN SIMPSON, qualified as Co-Administratrices of the Estate of FRED E. BOWMAN, DECEASED.

The Co-Administratrices, being unable to agree upon

an Inventory of the Decedent's Estate, each submitted differing Inventories to the trial Court for approval.

The Inventory submitted by Petitioner excluded all of the Federal Credit Union shares but the Inventory submitted by the Respondent included one-half of such shares.

The matter was submitted to the trial Court on an agreed statement of facts. The Petitioner contended that all of the Federal Credit Union shares belonged to Petitioner following the death of her husband, because such shares were issued and held pursuant to the provisions of the Federal Credit Union Act authorizing issuance in joint tenancy with right of survivorship. The Respondent contended such shares were community property which could not be held by Texas spouses in joint tenancy with right of survivorship, and accordingly, one-half of such shares should have been included in the inventory of the Decedent's Estate and ultimately distributed to Respondent as the Decedent's only heir.

The trial Court refused to recognize the validity (or perhaps applicability) of the Joint Share Account Agreement and approved the Inventory submitted by Respondent, (Appendix B at 23) whereupon Petitioner timely perfected her appeal to the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas, which appeal was, by Administrative Order, transferred to the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas.

Petitioner argued, in her first point of error before the Court of Civil Appeals, that the Supremacy Clause of the United States Constitution made the Federal Credit Union Act operative in Texas under the rationale of *Free v. Bland,* 369 U.S. 663. The Court of Civil Appeals found ". . . no merit in the contention, . . ." (Appendix C at 26), overruled the point, and finding no similarity between the Petitioner's case and *Free v. Bland, supra,* and choosing to follow the Supreme Court of Maine in its decision of *DiPierro v. Dudley,* 317 A.2d 824, 827-828 (Maine S.Ct. 1974) affirmed the judgment of the trial Court. Thereafter, Petitioner timely applied to the Supreme Court of Texas, for a Writ of Error, arguing in her First Point of Error that the holding of the Court of Civil Appeals violated the United States Constitution Supremacy Clause by refusing to recognize that the Federal Credit Union Act controlled the question of ownership of Federal Credit Union shares. The Texas Supreme Court denied Petitioner's Application for Writ of Error thereby approving the Court of Civil Appeal's decision.

REASONS FOR GRANTING THE WRIT

The overriding issue of law here presented concerns the Supremacy Clause of the United States Constitution, art. VI, clause 2.

The doctrine of supremacy of federal law has been considered by this Court many times and repeatedly discussed in such manner as to indicate the State Courts' decisions in this case are not in accord with controlling doctrine and the applicable decisions of this Court, particularly the holding of this Court in *Free v. Bland,* 369 U.S. 663, 82 S.Ct. 1089, 8 L.Ed.2d 180 (1962).

This case and the case of *Free v. Bland, supra.* are strikingly similar, differing only in facial aspects, but have been considered by the Texas Courts as if the two cases had nothing at all in common, a situation which il-

lustrates the need for further clarification by this Court as to the application of the supremacy clause.

The decisions of the Texas Courts, in this case have eroded the principles so carefully explained by this Honorable Court in its previous decisions concerning the supremacy issue. In so doing, the Texas Courts are circumscribing the proper scope of federal authority and have created a conflict between federal and state law. Such conflict presents an important federal question for the attention of this Court. Each day the conflict continues enhances dissension between federal and state governments and disseminates confusion between the State and its citizens. Those whom the law is designed to serve justifiably demand consistency.

Although this case portends to be an intellectual exercise exploring ancient principles of joint tenancy with right of survivorship, the core question and central issue merely calls for a modern response to two of the basic tenets set forth in *Free v. Bland, supra*, i.e.: (1) is there a valid federal law applicable, and if so, (2) is there a conflict between the federal law and the state law involved. *Id.* at 666.

The specific federal law involved is the Federal Credit Union Act, Title 12 U.S.C.A., sec. 1751 et seq. (1969). The specific State law involved is that portion of the Texas Constitution inversely defining "community property", art. XVI, sec. 15, as interpreted, construed and applied by the Supreme Court of Texas in cases such as *Hilley v. Hilley*, 161 Tex. 569, 342 S.W.2d 565 (1961); *Williams v. McKnight*, 402 S.W.2d 505 (Tex. 1966) and, by refusing writ of error, this case.

The Federal Credit Union Act permits members of a Federal Credit Union to form joint tenancies with a right of survivorship

Joint tenancy with right of survivorship is a privilege and a valuable right extended to Federal Credit Union members. 12 U.S.C.A. sec. 1759 (Supp. 1976) at all times material to this case provided:

> "shares may be issued in joint tenancy with right of survivorship with any persons designated by the credit union member, but no joint tenant shall be permitted to vote, obtain loans, or hold office, unless he is within the field of membership and is a qualified member."

FRED BOWMAN, a member of the Continental EMSCO Federal Credit Union, and his wife, DARLENE BOWMAN, acquired about $20,000 worth of Federal Credit Union Shares which were issued pursuant to the provisions of Section 1759 above quoted in joint tenancy with right of survivorship and in accordance with a written agreement signed by Mr. and Mrs. Bowman, which, among other things not here pertinent, provided:

> "All sums of money . . . paid in on shares . . . with all accumulations thereon, are and shall be owned (by Mr. and Mrs. Bowman) jointly, with right of survivorship."

It is undisputed, in fact, stipulated, that Mr. and Mrs. Bowman actually intended to create a joint tenancy with right of survivorship. FRED BOWMAN died with the intention that his wife would receive all the federal credit union shares upon his death, and the belief that his and his wife's rights and privileges under the Federal Credit Union Act would be recognized.

Texas law imposes additional requirements on right of husband and wife to hold Federal Credit Union shares in joint tenancy with right of survivorship

Texas is a "community property" state and, *Free v. Bland* situations excepted, generally takes the position that a husband and wife cannot hold community property in joint tenancy with right of survivorship. *Hilley v. Hilley, supra*. The fact that the community property involved is shares in a Federal Credit Union seems to make no difference to Texas Courts. *Bowman v. Simpson*, 546 S.W. 2d 99, 101 (Ct. Civ. App.—Beaumont, 1977 err. ref'd.) But c.f. *Stephens v. Pollard* 319 S.W.2d 447 (Ct. Civ. App.—Dallas 1958), affirmed on other grounds 161 Tex. 594, 343 S.W.2d 234 (1961).

There seems to be no public policy in Texas against husband and wife holding their separate properties in joint tenancy with right of survivorship. *Terrill v. Davis*, 418 S.W.2d 333, 336 (Ct. Civ. App.—Eastland, 1967 err. ref. n.r.e.). In fact, since the 1948 Amendment to Article XVI, Section 15 of the Texas Constitution, husband and wife may even convert their community property into separate property. The pertinent portion of the 1948 Texas Constitutional Amendment reads:

> "provided that husband and wife, without prejudice to existing creditors, may from time to time by written instrument, as if the wife were a feme sole, partition between themselves in severalty or into equal undivided interests all or any part of their existing community property. . . ."

It would follow therefore, that if a Texas domiciled husband and wife were to convert their community property into separate property (via partition) they could

then enter into a valid joint tenancy agreement with right of survivorship pertaining to that very same property. But the partition is a prerequisite. In its *Williams v. McKnight, supra,* explanation of the *Hilley v. Hilley,* case, *supra,* the Supreme Court of Texas stated that community property has to be:

> ". . . rendered separate by statutory partition before survivorship rights arise from a joint tenancy agreement between husband and wife." *Id.* at 507.

This two-step procedure, requiring a partition first and then the joint tenancy agreement undoubtedly originated in *Hilley v. Hilley, supra,* and was the fundamental basis of the State Courts' holdings in the instant case.

It is not contended that Mr. and Mrs. Bowman ever signed some separate document the terms of which said in effect, "We partition our community owned Federal Credit Union Shares into equal undivided interests so that henceforth those shares constitute separate property; accordingly and subsequent to such partition we enter into a joint tenancy agreement with right of survivorship in respect to those same Federal Credit Union Shares." Indeed not! Their approach to the matter was much more direct. They did what the Federal Credit Union Act ostensibly allowed them to do. They signed a joint tenancy agreement with right of survivorship. Now, after Mr. Bowman's death, the Texas Courts say the joint tenancy agreement is ineffective and the surviving widow does not own all the Federal Credit Union Shares she and her deceased husband had purchased under such agreement.

The validity of the Federal Credit Union Act is not here directly disputed nor has the authority of Congress

in this matter been openly challenged. Instead, the Texas Courts, while professing to recognize the validity of the Federal Credit Union Act, simply refuse to find such federal law applicable. Accordingly, Texas Courts applied Texas law to the stipulated facts of this case and reach a result exactly opposite to the result required by federal law.

The conclusion is obvious, a conflict exists between the Federal Credit Union Act and the decisions of the Texas Courts.

Laws of the United States enacted pursuant to Constitutional authority, are a part of the Supreme Law of the Land

The supremacy clause of the United States Constitution, art. VI, clause 2, is a relevant and often controlling factor in any case where a conflict exists between federal law and state law. As this Honorable Court stated in *Free v. Bland, supra:*

> "The relative importance to the States of its own law is not material when there is a conflict with a valid federal law, for the framers of our Constitution provided that the federal law must prevail." *Id.* at 666

In *Free v. Bland,* this Honorable Court concluded by reiterating a statement attributed to Chief Justice Marshall:

> " . . . any State law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Id.* Citing *Gibbons v. Ogden,* 9 Wheat. 1, at 210, 211, 6 L.Ed. 23.

The principles of supremacy discussed in *Free v. Bland,* had been previously explained by this Court in many other cases, among them *Mayo v. United States,* 319 U.S. 441, 63 S.Ct. 1137, 87 L.Ed. 1504 (1945), wherein this Court stated:

> " . . . it is necessary for uniformity that the laws of the United States be dominant over those of any state. . . . A corollary to this principle is that the activities of the Federal Government are free from regulation by any State. No other adjustment of competing enactments or legal principles is possible." *Id.* at 445.

Articulate generations of thoughtful writers have not yet better expressed the fundamentals of the principle set forth in the words of Art. VI of the United States Constitution, which declare: "The Constitution and the Laws of the United States . . . made in pursuance thereof . . . shall be the supreme law of the land."

Congress intended the Federal Credit Union Act to control all matters pertaining to Federal Credit Unions

The purpose behind the Federal Credit Union Act is expressly stated by Congress in the Act of June 26, 1934, chap. 750, 48 Stat. 1216, et seq. The purpose being:

> "To establish a Federal Credit Union System, to establish a further market for securities of the United States and to make more available to people of small means credit for provident purposes a national system of cooperative credit, thereby helping to stablilize the credit structure of the United States." 73 Cong. Sess. II, p. 1216.

The authority behind these acts rest in the long standing power of Congress to insure the general welfare of the United States, to regulate the value of money, and to regulate commerce among the several states. United States Constitution, Art. 1, Sec. 8.

The Federal Government has a valid and vital interest in the credit system of this country and also has an interest in the interstate commerce involved in establishing "a further market for securities of the United States." 73 Cong. Sess. II, p. 1216. The stablilization of credit can best be achieved on a national level as is expressed in the Act's stated purpose. As was stated in *Northern Securities Co. v. United States,* 193 U.S. 197, 24 S.Ct. 436, 48 L.Ed. 679 (1904), in discussing the Congress and its powers over interstate commerce:

> . . . where the subject to which the power applies is national in its character, or of such a nature as to admit of uniformity of regulation, the power is exclusive of all State authority. Citing *Welton v. Missouri,* 91 U.S. 275, 280.

Had the Congress intended each state to control the provisions of the various federal credit unions there would be no reason for the Federal Credit Union Act, which specifically details the rights, privileges and procedures to be followed.

The state Courts, in the case here presented, have relied heavily on the decision of the Supreme Court of Maine in the case of *DiPierro v. Dudley,* 317 A.2d 824 (Maine Sup. Ct. 1974) in holding the Federal Credit Union Act inapplicable. The DiPierro Court, under similar circumstances, held:

> "We thus conclude that the amendment to Section 1759 in 1946 was not intended to create a type of joint tenancy which would contravene state law but only to place the various federal credit unions in a position of competitive equality with other banking institutions serving the same geographical area." *Id.* at 827, 828.

The 1946 Amendment to Section 1759 under consideration in DiPierro actually only made a restricted enlargement to the original Federal Credit Union Act. Prior to the 1946 Amendment federal credit union members could own shares in joint tenancy with right of survivorship provided the joint tenants were all members of the federal credit union. (U.S.) S. Rep. No 1647, July 3, 1946, U. S. Code Cong. Serv. p. 1323 (1946). After the 1946 Amendment non-members could also be joint tenants with right of survivorship, if designated by the credit union member, but with restrictions, namely the non-member joint tenant could not vote on credit union affairs, could not obtain loans, and could not hold offiice in the credit union. It is abundantly clear what Congress did by enacting the 1946 Amendment to 12 U.S.C.A. Sec. 1759, and it would seem incongruous to say the Congress intended anything else.

The "competitive equality" language, used by the *DiPierro* Court, has a pleasant ring but is hardly justified by the facts and finds no support in the words of the Federal Credit Union Act. The steady growth of Federal Credit Unions, both in number, deposits and members belies the need for "competitive equality" protection. (U.S. S. Rep. No. 91-518, Nov. 5, 1969, 1970 U.S. Code Cong. Adm. News p. 2479; and U. S. House Rep. No. 91-1457, October 5, 1970, 1970 U. S. Code Cong.

Adm. News p. 4166, 4167, reports that in 1970 there were a greater number of credit unions, over half being federal credit unions, than all other financial institutions combined, with in excess of $14,000,000,000 in savings and more than 20,000,000 American members.

The state Courts in the instant case also relied on an assumption, or perhaps a conclusion, that "In this instance, the dispute is wholly between two individuals, and the rights of the federal government are in no manner involved." *Bowman v. Simpson, supra,* at 101. The Texas Courts found authority to support their position that Federal law is here inapplicable from the language of this Honorable Court in *Bank of America National Trust and Savings Association v. Parnell,* 352 U.S. 29, 77 S.Ct. 119, 1 L.Ed.2d 93 (1956). The Texas Supreme Court had made a similar conclusion in *Free v. Bland, supra,* (and as a matter of fact cited the *Parnell* case for authority) but this Honorable Court, in the *Free* case, put matters into perspective with the statement that "The Supreme Court of Texas' interpretation of the Supremacy Clause is not in accord with controlling doctrine." *Free* at 666.

If State law interferes with a market for the securities of the United States or tends to constrict a national system for cooperative credit or in some manner disturbs the stability of the credit structure of the United States, the rights of the Federal government are necessarily involved. It is submitted that once again, the Supreme Court of Texas' interpretation of the Supremacy Clause is "not in accord with controlling doctrine", and that Congress, in fact, intended the Federal Credit Union Act to control all matters pertaining to Federal Credit Unions.

Where there is a conflict between the state law and the federal law, the former must yield

It has become clear that a conflict exists between the respective federal and state laws.

The rights and privileges of the Federal Credit Union members are clearly set forth in the Federal Credit Union Act. The assertion of those federal rights are not to be defeated under state law. *Arnold v. Panhandle & Santa Fe Ry. Co.,* 353 U.S. 360 at 361 (1957), 77 S.Ct. 840, 1 L.Ed.2d 889 (1957), *Allen v. Allen,* 363 S.W.2d 312 (Ct. Civ. App.—Houston 1962) and *Southern Pacific Transportation Company v. Allen,* 525 S.W.2d 300 (Ct. Civ. App.—Houston [14th Dist.] 1975).

The law of Texas ". . . stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52 at 67, 61 S.Ct. 399, at 404-405, 85 L.Ed. 581 (1941).

Texas law, as it now stands, not only encroaches upon, but pre-empts the authority and scope of federal legislation.

The *Free* case, *supra,* is the case in point and an appropriate case with which to conclude. The fact situations are remarkably similar even down to the refusal by the Texas Supreme Court to uphold the joint tenancy agreement. (There, however, the federal "law" was Treasury regulations, whereas here, it is a federal statute.) This Court granted writ of certiorari in the *Free* case and reversed the Texas decision.

In the interest of consistency and in accordance with applicable controlling doctrine, Petitioner, with all due respect, prays this Honorable Court grant her Petition for

Writ of Certiorari and upon hearing hereof reverse the decision of the Supreme Court of Texas, and to render judgment to the effect that the Joint Tenancy Agreement with right of survivorship entered into between Petitioner and her late husband, pursuant to the provisions of the Federal Credit Union Act, is applicable and controlling in this case.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

DON BRADSHAW
Counsel of record
for Petitioner and

ANDREW C. BROWN
Of Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of August, 1977, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid to Respondent's Attorney of record, Stephen W. Hanks, of Hanks & Winchester, 720 Houston Bar Center Building, 723 Main Street, Houston, Texas, 77002, on the 5th day of August, 1977.

DON BRADSHAW
Counsel for Petitioner

APPENDIX A

NO. 127,400

IN THE MATTER OF
THE ESTATE OF
FRED E. BOWMAN, DECEASED

IN THE PROBATE COURT

NUMBER TWO (2) OF

HARRIS COUNTY, TEXAS

STIPULATION OF FACTS

The parties to the above entitled and numbered cause agree that the following is a statement of the case and of the facts upon which judgment shall be rendered therein, the controversy therein being submitted to the Court upon same as such agreed Statement of Facts, without further record or need thereof:

1) On the 4th day of November, 1963, FRED E. BOWMAN and his wife, DARLENE RUTH BOWMAN, executed a "Joint Share Account Agreement", applicable to deposits made with the Continental-Emsco Federal Credit Union.

2) The aforesaid Joint Share Account Agreement provided in substance that FRED E. BOWMAN and DARLENE RUTH BOWMAN, as Joint owners of the account, agreed with each other and with the federal credit union that "All sums now paid in on shares, or heretofore or hereafter paid

in on shares by [either] of said joint owners to their credit as such joint owners with all accumulations thereon, are and shall be owned by them jointly, with right of survivorship".

3) The aforesaid Joint Share Account Agreement was subscribed by both FRED E. BOWMAN and DARLENE RUTH BOWMAN.

4) FRED E. BOWMAN and DARLENE RUTH BOWMAN intended to create joint interests with right of survivorship in and to all deposits made pursuant to the aforesaid Joint Share Account Agreement.

5) All sums of money deposited in the Joint Share Account were deposited subject to the aforesaid Joint Share Account Agreement.

6) The Continental-Emsco Federal Credit Union was, and is, a federal credit union organized pursuant to, and by authority of, Title 12, United States Code, § 1751 *et seq*.

7) On the 29th day of May, 1967, FRED E. BOWMAN and his wife, DARLENE RUTH BOWMAN executed a Co-Tenancy Agreement applicable to a safe deposit box with the Republic State Bank of Houston, Texas.

8) The aforesaid Co-Tenancy Agreement provided in substance that "it is agreed that each (or either) of the undersigned is the owner of the present and future contents of the box and that in the event of death of any (or either) of the undersigned,

the survivors or survivor shall have the right to withdraw said contents".

9) The aforesaid Co-Tenancy Agreement was subscribed by both FRED E. BOWMAN and DARLENE RUTH BOWMAN.

10) FRED E. BOWMAN and DARLENE RUTH BOWMAN intended to create joint interests with right of survivorship in and to all personal property placed within the safe deposit box covered by the aforesaid Co-Tenancy Agreement.

11) All sums of money deposited in safe deposit box were deposited subject to the aforesaid Co-Tenancy Agreement.

12) FRED E. BOWMAN died intestate on the 9th day of January, 1974, at which time the deposits with the Continental-Emsco Federal Credit Union amounted to $20,000 and the deposits within a safe deposit box at the Republic State Bank amounted to $12,470.

13) No determination of heirship has yet been made as to the said FRED E. BOWMAN but, insofar as these parties are concerned and to the best of their knowledge and belief, said decedent was survived only by DARLENE RUTH BOWMAN (surviving spouse) and PHYLLIS BOWMAN SIMPSON (daughter by prior marriage).

WITNESS OUR HANDS by our attorneys of record this 29th day of July, A.D. 1975.

/s/ VERNON L. HARRISON
Vernon L. Harrison
Attorney of Record for PHYLLIS B. SIMPSON, Co-Administratrix

/s/ ANDREW C. BROWN
Andrew C. Brown
Attorney of Record for
DARLENE RUTH BOWMAN,
Co-Administratrix

APPENDIX B

NO. 127,400

IN THE MATTER OF
THE ESTATE OF
FRED E. BOWMAN, DECEASED

IN THE PROBATE COURT
NUMBER TWO (2) OF
HARRIS COUNTY, TEXAS

FINAL JUDGMENT

BE IT REMEMBERED that on the 8th day of August, 1975, came on to be heard by this Court by and through their attorneys of record, DARLENE RUTH BOWMAN and PHYLLIS BOWMAN SIMPSON, Co-Administratrices of the Estate of FRED E. BOWMAN, Deceased, asking the Court to determine whether or not certain assets were part of the community between FRED E. BOWMAN and DARLENE RUTH BOWMAN at the time of FRED E. BOWMAN's death, such property being one joint savings account at Continental Emsco Federal Credit Union amounting to $20,000.00, and an accumulation of coins under a co-tenancy agreement in safety deposit box # 309 at Republic State Bank in Houston, Texas, in the amount of $12,470.00.

This question was submitted to the Court upon an agreed statement of facts, argument of counsel, and extensive legal briefs were filed herein; and accordingly.

The Court RULES, ADJUDGES and DECREES that both the above mentioned assets are and were part of the community between FRED E. BOWMAN and DARLENE RUTH BOWMAN at the date of FRED E. BOWMAN's death and that one-half of such assets should be included and are included in the estate of FRED E. BOWMAN, Deceased.

Further, it is ORDERED, ADJUDGED and DECREED that the Inventory of the Estate prepared by the attorney for PHYLLIS BOWMAN SIMPSON should be entered in this estate as the Inventory for such and such Inventory is hereby approved.

Co-Administratrix DARLENE RUTH BOWMAN objected and excepted to the aforesaid action of the Court and in open court duly gave notice of appeal to the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas.

Signed and entered this the 7th day of May, 1976.

/s/ PAT GREGORY
Probate Judge

APPROVED AS TO FORM:

DARBY, HARRISON & BLACK

By: /s/ VERNON L. HARRISON, JR.
Vernon L. Harrison, Jr.

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/s/ ANDREW C. BROWN
Andrew C. Brown

Attorney for Co-Administratrix
DARLENE RUTH BOWMAN
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Houston, Texas 77002

APPENDIX C

Darlene Ruth BOWMAN, Appellant,

v.

Phyllis Bowman SIMPSON, Appellee.

NO. 7900.

Court of Civil Appeals of Texas,

Beaumont.

January 6, 1977.

Rehearing Denied February 3, 1977.

Andrew C. Brown, Houston, for appellant.

Stephen Wayne Hanks, Houston, for appellee.

KEITH, Justice.

The appeal is by the widow of the decedent from a judgment of the probate court finding that two particular items of property constituted assets of the estate.

Fred E. Bowman died intestate leaving as his survivors our appellant, Darlene Ruth Bowman, his widow; and Phyllis Bowman Simpson, his daughter by a prior marriage and sole descendant. During the existence of the marriage of the decedent and appellant, they had accumulated a fund approximating $20,000 which was on deposit in an account in Continental Emsco Federal Credit Union, and a number of valuable coins worth in excess of $12,400 were in a safe deposit box in a bank.

The cause was submitted upon an agreed stipulation of facts which included the following:

As to the Credit Union balance: (1) on November 4, 1963, decedent and his wife executed a "Joint Share Account Agreement" applicable to such deposits, wherein they agreed with each other and with the credit union that "[a]ll sums now paid in on shares, or heretofore or hereafter paid in on shares by [either] of said joint owners to their credit as such joint owners with all accumulations thereon, are and shall be owned by them jointly, with right of survivorship"; (2) the parties intended to create joint interests with right of survivorship in and to all deposits made pursuant to such agreement; and (3) the credit union was and is one organized under *the* pursuant to Title 12, United States Code Annotated § 1751 (1969), et seq.

The safe deposit rental agreement applicable to the box wherein the coins were kept was executed by the decedent and wife on May 29, 1967, contained a Co-Tenancy Agreement providing in substance:

> "[I]t is agreed that each (or either) of the undersigned is the owner of the present and future contents of the box and that in the event of death of any (or either) of the undersigned, the survivors or survivor shall have the right to withdraw said contents."

The stipulation recites that the parties intended to create joint interests with right of survivorship in the property in such box, and that all sums of money deposited in said box were placed therein pursuant to the agreement.

[1] The stipulation is silent as to any other steps which the decedent and his wife may have taken in their

efforts to create a joint tenancy in and to the funds and coins with a right of survivorship.[1] Under the rule governing review of agreed cases, we are not permitted to draw any inference or find any fact not embraced in the agreement unless as a matter of law such further inference or fact is necessarily compelled by the evidentiary facts agreed upon. *Brown v. International Service Insurance Company*, 449 S.W.2d 491, 492 (Tex. Civ. App.—Beaumont 1969, writ ref'd n.r.e.), and cases therein cited.

[2] Appellant's first point of error is based upon an amalgam of three diverse elements: She argues that the Supremacy Clause of the federal constitution (Art. VI, Cl. 2) makes a federal statute [12 U.S.C.A. § 1759 (1969)][2] operative in Texas under the rationale of *Free v. Bland*, 369 U.S. 663, 82 S.Ct. 1089, 8 L.Ed.2d 180 (1962). Thus, appellant contends that since the federal statute permits the use of joint tenancy agreements with right of survivorship, it is supreme in the field and governs shares (deposits) in federal credit unions. We find no merit in the contention, and the point is overruled.

A well-written opinion by the Supreme Judicial Court of Maine faced the precise question now urged by appellant and rejected the contention after reviewing the legislative history of the federal statute. We follow *Di-Pierro v. Dudley*, 317 A.2d 824, 827-828 (Maine Sup. Ct. 1974), where it was held:

1. See *Williams v. McKnight*, 402 S.W.2d 505, 508 (Tex. 1966). See also, *Texas Family Law* (Speer's 5th Ed., Simpkins, 1976) § 22.17, pp. 448-450.

2. The federal statute noted, insofar as material to this case, reads: "Shares [connoting membership in a Federal credit union] may be issued in joint tenancy with right of survivorship with any persons designated by the credit union member, but no joint tenant shall be permitted to vote, obtain loans, or hold office, unless he is within the field of membership and is a qualified member."

> "We thus conclude that the amendment to Section 1759 in 1946 was not intended to create a type of joint tenancy which would contravene state law but only to place the various federal credit unions in a position of competitive equality with other banking institutions serving the same geographical areas."[3]

Free v. Bland, supra, is readily distinguishable from the facts in the case at bar. The survivorship provision relating to savings bonds issued by the United States Government prevails over State law because it is an integral part of the exercise of federal power, and directly involves the interests of the Federal government as a borrower. This is made abundantly clear by two short excerpts which we take from *Free v. Bland*, supra:

> "Article I, § 8, Clause 2, of the Constitution delegates to the Federal Government the power '[t]o borrow money on the credit of the United States.' Pursuant to this grant of power, the Congress authorized the Secretary of the Treasury, with the approval of the President, to issue savings bonds in such form and under such conditions as he may from time to time prescribe. . . ." (369 U.S. at 666, 82 S.Ct. at 1092).
>
> * * * * * *
>
> "The success of the management of the national debt depends to a significant measure upon the success of the sales of the savings bonds. The Treasury is authorized to make the bonds attractive to savers and investors. One of the inducements selected by the Treasury is the survivorship provision, a convenient method of avoiding complicated probate proceedings." (369 U.S. at 669, 82 S.Ct. at 1093).

3. It was the 1946 amendment to the basic statute which permitted such unions to issue shares in joint tenancy with a right of survivorship. Historical note following 12 U.S.C.A. § 1759 (West 1969, p. 17). Later amendments to § 1759 did not affect this language added in 1946.

In this instance, the dispute is wholly between two individuals, and the rights of the federal government are in no manner involved. See *Bank of America National Trust and Savings Association v. Parnell,* 352 U.S. 29, 33, 77 S.Ct. 119, 1 L.Ed.2d 93 (1956). The Supreme Court, in *Free,* supra, recognized that state law will control in cases where the litigation is between two private parties (as in *Parnell,* supra) and does not "intrude upon the rights and duties of the United States." (369 U.S. at 669, 82 S.Ct. at 1094). Point of error number one is overruled.

[3, 4] We quote appellant's second point of error:

> "The trial court committed reversible error by refusing to recognize the survivor's ownership of property located in a safe deposit box the contents of which were controlled by a joint tenancy with right of survivorship agreement."

The appellant-widow argues that the decision in *Hilley v. Hilley,* 161 Tex. 569, 342 S.W.2d 565 (1961), as explained in *Williams v. McKnight,* 402 S.W.2d 505 (Tex. 1966), along with the adoption of Tex. Family Code Ann. § 5.42 (1975), authorized the creation of a joint tenancy with right of survivorship by the single simple act of signing the bank form governing the safe deposit box. We disagree and overrule such point of error.

The Supreme Court, in *Hilley,* supra, held that as to separate property, the spouses could create a joint tenancy between them with right of survivorship. But, as pointed out in *Williams v. McKnight,* supra:

> "When the property is initially community, *it must be rendered separate by statutory partition before survivorship rights* arise from a joint tenancy agreement between husband and wife." (402 S.W.2d at 507) (Emphasis added)

This is, necessarily, a two-step procedure: First, the partition of the community property must be effected in accordance with the provisions of Tex. Family Code Ann. § 5.42 (1975); then, *after* such partition has been effected, the joint tenancy agreement with right of survivorship may be entered into. We have no indication that the first step was ever taken in this case.

[5] Appellant seemingly recognizes that a two-step proceeding is required but argues that the agreement (safe deposit signature card) effected a partition while simultaneously creating a right of survivorship. This argument was rejected in *Williams v. McKnight,* supra (402 S.W.2d at 508), and is rejected here.

The judgment of the probate court finding that the money on deposit with the federal credit union and the safe deposit box was properly included in the estate of the decedent was correct and is affirmed.

AFFIRMED.

STEPHENSON, J., not participating.

APPENDIX D

CLERK'S OFFICE — SUPREME COURT

Austin, Texas

Austin, Texas, May 11, 1977

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of BOWMAN v. SIMPSON, No. B-6608 was this day refused.

Very truly yours,

GARSON R. JACKSON, Clerk

IN THE

Supreme Court of the United States

NO. 77-207

DARLENE RUTH BOWMAN,
Petitioner

v.

PHYLLIS BOWMAN SIMPSON,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUBJECT INDEX

LIST OF AUTHORITIES

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UNITED STATES STATUTES

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Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This is a controversy between Phyllis Bowman Simpson, daughter of Fred E. Bowman, deceased, and her step-mother, Darlene Ruth Bowman, over the character of funds deposited by Fred and Darlene Bowman in a federal credit union in Houston, Texas.

QUESTION PRESENTED

The question presented is whether the provision of the Federal Credit Union Act which permits members to hold shares as joint tenants with a right of survivorship supersedes Texas Constitutional Law which prohibits community property from being jointly held with a right of survivorship.

ARGUMENT

THE TEXAS SUPREME COURT PROPERLY REFUSED PETITIONER'S APPLICATION FOR WRIT OF ERROR, AND AFFIRMED THE JUDGMENTS OF THE TRIAL COURT AND THE NINTH COURT OF CIVIL APPEALS.

A. Texas law prohibits the creation of a joint tenancy with right of survivorship out of community property.

It is clear and undisputed that in Texas, community property cannot be the subject of joint ownership with a right of survivorship. *Williams v. McKnight*, 402 S.W.2d 505 (Tex. Sup. 1966); *Hilley v. Hilley*, 161 Tex. 569, 342 S.W.2d 565 (1961).

This principle of Texas law is not merely legislative, but constitutional. The character of property owned or acquired during marriage is determined by the Texas Constitution, and spouses cannot by mere agreement change the character and nature of the rights and interests in property owned or acquired by them from that prescribed by law. *Hilley*, at 568. This is not just a footnote to Texas community property law. It is an integral part of the fabric of the community property system, and the "mere agreement" of Fred and Darlene Bowman when they deposited funds in the credit union should not be permitted to emasculate the structure of community property law in Texas.

The agreement signed by Fred and Darlene Bowman was virtually identical to survivorship agreements routinely executed in every bank, savings and loan, and state chartered credit union in Texas. Petitioner agrees

that in each of these other cases, the agreement would be invalid. This tenet of Texas constitutional law is not voided simply because the credit union, an association of individuals, was organized pursuant to a federal statute.

B. The Federal Credit Union Act does not supersede Texas Constitutional Law.

Petitioner argues that the constitutional law of Texas should be disregarded in this case, because a Federal Statute, 12 U.S.C.A. § 1759, permits federal credit union accounts to be established in the form of a joint tenancy with right of survivorship.

Respondent urges that this provision was not intended to and does not supersede Texas law of community property. In fact, the opposite result was intended; the provision was designed to place federal credit unions in a position of equality with local banking institutions, equally subject to the state constitutional requirements of community property.

Petitioner's only authority is the case of *Free v. Bland*, 369 U.S. 663, 82 S.Ct. 1089, 8 L.Ed.2d 180 (1962), on which she relies to support her contention that the constitutional requirements of Texas community property law should be disregarded. In *Free*, a husband and wife jointly held United States Savings Bonds. A Treasury Regulation mandated that when bonds were so held, a right of survivorship was created. This Honorable Court held that the state law of community property must yield to the mandate of the Treasury regulation.

The principle behind this Court's decision in *Free* is unique to the issuance and ownership of United States Savings Bonds, and is not applicable to this case.

The power to borrow money is specifically delegated to the Federal Government by the United States Constitution:

> Article I, Section 8, Clause 2, of the Constitution delegated to the Federal Government the power "to borrow money on the credit of the United States." Pursuant to this grant of power, the Congress authorized the Secretary of Treasury with the approval of the President, to issue savings bonds in such form and under such conditions as he may from time to time prescribe . . . *Free*, 369 U.S. at 666.

Pursuant to this power, the Treasury made the survivorship clause an integral part of the borrowing system, as an inducement for the purchase of savings bonds:

> The success of the management of the national debt depends to a significant measure upon the success of the sales of the savings bonds. The Treasury is authorized to make the bonds attractive to savers and investors. One of the inducements selected by the Treasury is the survivorship provision, a convenient method of avoding complicated probate proceedings. *Free*, 369 U.S. at 669.

The survivorship provision governing ownership of savings bonds prevails over State law because it is an integral part of the exercise of federal power, and directly affects the interests of the Federal Government, the borrower. In our case, a joint deposit between two individuals in a federal credit union is a purely private transaction between two Texas residents, and in no way affects the interests of the Federal Government. This critical distinction was recognized by this Court in *Bank of America National Trust and Savings Association v. Parnell,* 352 U.S. 29, 77 S.Ct.

119, 1 L.Ed.2d 193 (1956). In *Parnell*, the issue was whether Federal or State law ought to apply in an action between private persons for conversion of government bonds. This Court held that State law applied:

> The present litigation is *purely between private parties*, and does not touch the rights and duties of the United States. The only possible interest of the United States in a situation like the one here, exclusively involving the transfer of government paper between private persons, is that the floating of securities of the United States might somehow or other be adversely affected by the local rule of a particular state regarding the liability of a converter. This is far too speculative, far too remote a possibility to justify the application of Federal law to transactions essentially of local concern. *Parnell*, 352 U.S. at 33. [Emphasis added]

This Court in *Free* distinguished *Parnell*, recognizing that state law will control in cases where the litigation is between two private parties and does not "intrude upon the rights and duties of the United States." *Free*, 369 U.S. at 669.

The present case is a controversy between two private individuals, and in no way directly involves the rights, duties, or interest of the United States. In this situation, as this Court has held in *Parnell* and recognized in *Free*, state law controls.

The Ninth Court of Civil Appeals and the Texas Supreme Court recognized this distinction. Petitioner ignores the significance of the distinction, asserting that *Free v. Bland* and this case are "strikingly similar". (Petitioner's Application, p. 5). Petitioner fails to understand the distinction and its importance.

The transaction at issue in *Free v. Bland* was between the Federal Government, the debtor, and Mr. and Mrs. Free, the creditors. The survivorship provision of that contract was a necessary element of the Government's power and duty to manage its debt structure.

The transaction at issue in the instant case is between two private individuals, both Texas residents, who simply agreed between themselves to hold their community property as joint tenants with a right of survivorship, an agreement which is void under Texas law. Their decision to place their property into an account in a federal credit union does not change the result. The credit union is not the federal government, but merely a group of private individuals permitted by federal law to form a credit association for the furtherance of their own interests. The interests of the federal government are not involved, and state law controls.

The question presented in this case has been previously considered and decided by the Supreme Court of Maine, in *DiPierro v. Dudley*, 317 A.2d 824 (Me. 1974). The opinion in *DiPierro* contains an excellent discussion of the origin of the survivorship provision in question, its legislative history, its purpose, and its relation to state law.

In *DiPierro*, funds had been held in a joint account at a federal credit union by deceased and his niece. Upon his death, the niece claimed the proceeds pursuant to the survivorship provision in question. The executrix of the estate of the deceased sued the niece to recover the proceeds, relying on a Maine statute which prohibited survivorship accounts between persons so related. The question presented, as in the instant case, was whether

the local statute applied, rendering the survivorship clause ineffective, or whether federal law prevailed.

The Court in *DiPierro* held that the Maine statute prevailed and judgment was rendered for the executrix. The Court's reasoning was based in part on an analysis of the congressional purpose in providing for survivorship accounts in federal credit unions. After a review of the Congressional Record, the Court concluded that:

> It would thus appear that Congress was not thinking in terms of superseding settled state law with reference to joint tenancies but, rather, in putting the various federal credit unions on a status equivalent to that of other competing financial institutions. *DiPierro*, 317 A.2d at 827.

A further indication that Congress did not intend to supersede state law is a provision in the Act which permits easy conversion of a federal to a state credit union, 12 U.S.C.A. § 1771. The credit union involved in this case could be easily and simply converted to a state credit union, and then back to a federal, and so on. It is unthinkable that Congress intended for the property rights of the members to radically change with each such conversion, yet this would be the result if state law is superseded in this case. Concerning this provision, the Court in *DiPierro* stated:

> It would be inconceivable that Congress would have intended to create a special type of joint tenancy and at the same time freely permit the conversion of a federal credit union to a state credit union where such a joint tenancy contravenes the laws of that state. Congress clearly indicated its intent by the enactment on October 19, 1970, of 12 U.S.C.A. § 1970 which states:

> "It is not the purpose of this subchapter to discriminate in any manner against state-chartered credit unions and in favor of federal credit unions, but it is the purpose of this subchapter to provide all credit unions with the same opportunity to obtain and enjoy the benefits of this subchapter."

DiPierro, 317 A.2d at 827.

It is clear that the purpose of the survivorship provision of the Federal Credit Union Act is not to supersede state law, but to place federal credit unions in a position of equality with local institutions. Therefore, local limitations on survivorship accounts must apply equally to the federal credit union accounts, or the very purpose of the provision and the Act will be defeated.

The Court in *DiPierro* concluded that state law concerning joint tenancy with right of survivorship prevails over the survivorship provision of the federal credit union Act:

> We thus conclude that the amendment to Section 1759 in 1946 was not intended to create a type of joint tenancy which would contravene state law but only to place various federal credit unions in a position of competitive equality with other banking institutions serving the same geographical area. *DiPierro*, 317 A.2d at 827.

The principal of equality is evident in other federal acts governing national financial institutions. The McFadden Act of 1927, 12 U.S.C.A. § 36, could be construed to authorize branch banking in the entire federal banking system. However this Court held in *First National Bank of Logan v. Walker Bank and Trust Company*, 385 U.S. 252, 87 S.Ct. 492, 17 L.Ed.2d 343

(1966), and reiterated in *First National Bank in Plant City, Florida v. Dickinson*, 396 U.S. 122, 90 S.Ct. 337, 24 L.Ed.2d 312 (1969), that the purpose was not to supersede state law and permit branch banking in states where it was otherwise prohibited. The purpose was to place federal banks in a position of competitive equality with state banks, equally subject to state laws:

> The policy of competitive equality is therefore firmly imbedded in the statutes governing the national banking system. *First National Bank v. Dickinson*, 396 U.S. at 133.

This policy can only be served in this case if the community property law of Texas applies to federal as well as state-chartered credit unions.

As Petitioner recognizes (Petitioner's Application, p. 15), the test is not simply whether there is a conflict between the federal and state law, but whether the "full purposes and objectives of Congress" will be accomplished. *Hines v. Davidowitz*, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941). The full objectives of Congress in this case can only be served if Texas Community property law prevails.

The Texas Constitutional restriction against the creation of a joint tenancy with right of survivorship out of community funds applies equally to deposits in the federal credit union account and the Texas Supreme Court and Ninth Court of Civil Appeals correctly affirmed the judgment of the Probate Court which held that one-half of the funds in the Continental Emsco account were included in the estate of the deceased.

Respondent therefore urges that Petitioner's Application for a Writ of Certiorari be DENIED, or in the alternative the Judgment of the Texas Supreme Court be affirmed, and all costs assessed against Petitioner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing brief has been forwarded to the attorney of record, via certified mail, return receipt requested, this 2 day of September, 1977.

Stephen W. Hanks

STEPHEN W. HANKS